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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

REPUBLICAN NATIONAL COMMITTEE,
NATIONAL REPUBLICAN SENATORIAL COMMITTEE,
and
NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE,
Petitioners,

v.

FEDERAL ELECTION COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

The Federal Election Commission's "best efforts" regulation, 11 C.F.R. § 104.7 (1993), conflicts with fundamental First Amendment principles, permits a grave intrusion into the right of free political speech and discourse that is essential to our First Amendment liberties, and cannot be squared with this Court's precedents. Accordingly, this Court should act to protect the core constitutional rights at stake.

ARGUMENT

I. THE COURT SHOULD NOT PERMIT THIS UNWARRANTED AND UNAUTHORIZED SUPPRESSION OF POLITICAL SPEECH TO CONTINUE.

This case presents more than an instance of error correction for the Court. The Court of Appeals decision permits a significant and unauthorized intrusion into the political speech between political committees and contributors. Political speech "occupies the core of the protection afforded by the First Amendment." *McIntyre v. Ohio Elections Comm'n*, 115 S. Ct. 1511, 1518 (1995). And as the Court has stated: "[I]t can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971).

That the decision below rests on a fundamentally flawed reading of this Court's jurisprudence in an area of such significance counsels in favor of review. *Buckley v. Valeo*, 424 U.S. 1 (1976), defines the outer limits of federal intrusion into political free speech, and this Court has been at pains recently to emphasize the strict reading that should be given that decision. *See Colorado Republican Fed. Campaign Comm. v. FEC*, 116 S. Ct. 2309 (1996).[1] The Court of Appeals has—in a manner at odds with the clear text and holding of *Buckley*—improperly expanded what the Court would contain. The decision below will

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[1] The *Colorado* case itself highlights the importance of considering the lower court's decison here. The appellate court opinion in that case, *Colorado Republican Federal Campaign Comm. v. FEC*, 59 F.3d 1015 (10th Cir. 1995), (which was ultimately reversed), was relied on by the FEC in promulgating an overbroad regulation, despite this Court's pending consideration of the issue. *See* FEC Final Rule, 60 Fed. Reg. 64,260, 64,270 (1995). Given the core First Amendment concerns which permeate the FEC's regulatory domain, there is a vital need to review decisions that erroneously regulate speech so that those decisions are not used to justify further violations of constitutional rights.

embolden the FEC to rely on a "blunderbuss" approach, to regulating political speech, *see McIntyre*, 115 S. Ct. at 1524, justifying itself with *Buckley*'s supposed sanction of a "by any means necessary" approach in the name of disclosure. Such heavy-handed intrusion into protected speech must not be tolerated by this Court.

Review here is made even more important given the unique role of the FEC in regulating the political campaigns of the nation. Given this responsibility, the Court must be particularly vigilant in policing the FEC's conduct as it touches on the core of our First Amendment liberties. The best efforts regulation, as it now stands, is a nakedly content-based suppression of political speech that can aptly be described as a draconian overaction by the agency. Without correction and clear guidance from this Court, further unjustified encroachments by the FEC are inevitable.[2]

II. THE BEST EFFORTS REGULATION IS NOT AUTHORIZED BY FECA.

The Petition establishes the unreasonableness and unlawfulness of the FEC's construction of the best efforts provision in FECA. Petition at 22-26. The FEC responds that "Petitioners' proposal of a single effort that may be fettered by competing information is . . . inconsistent with the statute's plain meaning." Opposition at 14. That statement is indeed remarkable, given that this single effort proposal is *precisely what the FEC required in its old best efforts regulation*, App. at 107a, a regulation that remained in place for over a decade.

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[2] Moreover, it would be fruitless to wait—as the FEC suggests, Opposition at 8—for a conflict to develop within the Circuits on the constitutionality of the best efforts regulation. Political committees are transient by nature, limited in administraive resources, and ill-equipped to mount years-long constitutional challenges. Should the lower court decision stand, other challenges are most unlkely.

That the FEC has so blithely disregarded what its own prior rulemaking indicated was a carefully reasoned regulation grounded in congressional intent, *see* Petition at 23-24, should give this Court considerable pause at the thought of allowing the new regulation to remain in force. Simply stated, the FEC is insufficiently sensitive to the First Amendment concerns that permeate its regulation.[3] The agency may be able to regulate such things as typeface or placement of requests, but it is beyond its powers to redefine its regulation in a manner that eradicates speech.

III. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THIS COURT'S ESTABLISHED FIRST AMENDMENT PRECEDENTS.

The FEC claims that the Court of Appeals correctly held that this Court's decision in *Buckley* resolves any doubt about the constitutionality of the best efforts regulation. *See* Opposition at 8-9; App. at 15a-16a. The Court, however, had no occasion there to address the free speech implications of any mandatory and restricted communications between political committees and contributors regarding the disclosure requirements because, at the time, there were no such dictated communications. As discussed more fully in the Petition (at 15-16), this separate intrusion on free political speech must be justified in its own right.

The Court of Appeals held that the " 'best efforts' provision—added to the Act after the Court decided *Buckley*—essentially offered an optional safe harbor or affirmative defense for political committees unable to secure the

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[3] Significantly, the Opposition fails to address the Petition's reliance on *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495 (1996), for the proposition that speech bans are not simple tools at the agency's disposal but dire measures that must be justified on their own terms. This is further evidence that the agency refuses to recognize the First Amendment implications of its actions.

identifying information" and thus "actually makes the Act's reporting requirements less stringent than the absolute disclosure requirements upheld in *Buckley*." App. at 15a-16a. This is a fundamental mistake. *Buckley* did not uphold the absolute disclosure requirements; it did not address that issue. *Buckley*, 424 U.S. at 60. Even taken this flawed premise as true, however, the FEC's extension fails as a matter of logic and practice.

The best efforts provision of the statute—and of the FEC's challenged regulation—does not reflect Government beneficence, i.e., an *optional* way to comply with the absolute disclosure requirements of the statute. Indeed, the FEC admits as much when it states, "Congress imposed a *requirement* of 'best efforts.' " Opposition at 12 (emphasis added). That is so because the best efforts provision of the Act is effectively the only available means of compliance, given the absence of any requirement for contributors to disclose the sought-after information. And the FEC, in determining what constitutes "best efforts," has made its definition mandatory, not optional: "the treasurer and the committee *will only* be deemed to have exercised best efforts if" the FEC's follow-up communication procedures are obeyed to the letter. 11 C.F.R. § 104.7 (1993) (emphasis added). This is a safe harbor surrounded by reefs and shoals and the wreckage of the First Amendment.

There is also conflict between the decision below and *McIntyre*, as the lower court subjected this ban on political speech to only intermediate scrutiny.[4] It would indeed be

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[4] The FEC also asserts that *McIntyre v. Ohio Elections Comm'n*, 115 S. Ct. 1511 (1995), itself distinguished *Buckley* and the disclosure provisions of FECA. *See* Opposition at 11 n.3. That is misleading. The relevant portion of *McIntyre* discussed *Buckley* not in the context of determining whether the statute at issue was content-based but in evaluating the nature of the state's interest in suppressing that speech. The Court distinguished the state's interest in *Buckley* in deterring corruption in national campaigns through public disclosure, an interest the Court in *McIntyre* found wholly inapplicable in the context of an individual and independent pamphleteer. *See McIntyre*, 115 S. Ct. at 1522-23.

ironic if the fundamental right of free speech in political campaigns was to receive equal, or even subordinate, treatment with the right to label the alcoholic content of beer, *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585 (1995), the right to put a "For Sale" sign on one's lawn, *Linmark Assocs., Inc. v. Willingboro*, 431 U.S. 85 (1977), or the right to play loud rock-and-roll music. *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). *McIntyre* explicitly recognizes the importance of political speech and accordingly dictates the higher level of protection it must receive. *McIntyre*, 115 S. Ct. at 1519.

CONCLUSION

In sum, this case presents important issues of law that must be resolved. For the above reasons and the reasons set forth in the Petition for Writ of Certiorari, the Petition should be granted.

Respectfully submitted,

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